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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTOPHER MARENCO,

Defendant and Appellant.

F057814

(Super. Ct. No. MF46884)

OPINION

APPEAL from a judgment of the Superior Court of Merced County. Carol Ash, Judge.

Paul V. Carroll, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Lloyd G. Carter and Leanne LeMon, Deputy Attorneys General, for Plaintiff and Respondent.

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This is an appeal from judgment entered after a jury trial. Defendant and appellant Christopher Marenco contends his convictions for murder and participation in a criminal street gang must be reversed due to evidentiary and instructional error by the trial court.

We conclude Marengo has not established that the trial court committed reversible error. He also contends his consecutive punishment for violation of Penal Code section 186.22, subdivision (a), must be stayed pursuant to Penal Code section 654. We agree with this contention.

FACTUAL AND PROCEDURAL HISTORIES

Marengo killed Rudy Hernandez during the early morning hours of January 1, 2008. Marengo shot Hernandez one time in the chest immediately after declaring, “I’m gonna fucking kill you, motherfucker.”

Marengo’s sister, Stephanie Castillo, had met Hernandez while Hernandez was in prison for domestic violence. Hernandez was involved in a Norteño street gang and was heavily tattooed and bore a large “M” on his chest, declaiming his membership in the M Street gang. By the time he left prison, however, Hernandez had decided to leave the gang life. His relationship with Stephanie continued after he was released from prison; he and Stephanie lived together at the time of his murder.

Marengo was a member of another Norteño gang, Dead End Loc. He disapproved of Stephanie’s relationship with Hernandez for at least two reasons. First, Marengo believed “woman beater[s]” never change, and he did not want his sister involved with such a person. Second, Marengo considered Hernandez a “DO”—a gang dropout—and he did not want such a person in his family. During the year Hernandez had been out of prison, he had behaved well toward Stephanie and her family. He gradually had been accepted by all of the family except Marengo.

On December 31, 2007, Stephanie, her children, and Hernandez went to the home of Carmen Castillo, a sister of Marengo and Stephanie. Carmen and her children shared a house with Denise Chavez, who was nine months pregnant at the time. Marengo was not invited to this gathering because of his attitude toward Hernandez.

All of the adults, except Chavez, began drinking early on the day of December 31. By 7:00 p.m., the adults and the children retired for naps or, in the case of Hernandez,

passed out. Around midnight, everyone went across the street to a friend's house. Sometime later, Stephanie took her children and went home. Hernandez later went back to Carmen and Chavez's house, where he lay down in the hallway.

Carmen and Chavez were sitting at the dining table talking at about 2:00 a.m. when Marengo arrived. Marengo had been drinking and was in a good mood. He asked for a beer and was standing by the table talking to Carmen and Chavez. Hernandez approached from behind Marengo, wearing a sleeveless t-shirt, with his muscles flexed and in an aggressive posture.

When Marengo turned and saw Hernandez, Marengo showed surprise and became agitated. He told Hernandez, "we got some business." He invited Hernandez to go to the front yard where, as it turned out, five to seven of Marengo's friends were waiting. Hernandez said he preferred the back yard. Carmen intervened and said they were not going anywhere and that the men should calm down. Hernandez adopted a conciliatory attitude. He told Marengo that, even if Marengo did not like the situation, Hernandez loved Stephanie, wanted to be part of the family, and wanted to make Stephanie happy. About this time, Chavez gathered the children and headed to the bedroom to call the police.

Marengo pulled a gun from his pocket and held it above his head. Marengo called Hernandez a dropout and said he did not want a dropout in his family. He said Hernandez was worthless. Carmen stepped between the two men and reached for Marengo's gun. All three were very close together. Carmen pulled the gun "down." Marengo shouted, "I'm gonna fucking kill you, motherfucker. I'm gonna shoot your ass." At trial, Carmen said she did not remember Marengo using the word "kill." To the contrary, she testified she remembered Marengo saying that he was going to "shoot" Hernandez. She recalled that Hernandez "kind of push[ed]" Carmen aside "[w]ith his body movement" while, at the same time, she tried to disengage from the men and join Chavez in the bedroom.

While she was banging at the bedroom door, Carmen heard a shot. She turned to see Hernandez holding the lapels of Marengo's coat. As Hernandez slid down, he continued to hold Marengo. Marengo struck Hernandez three times in the head and shook Hernandez off Marengo's leg.

Hernandez died from the gunshot wound. The pathologist testified that Hernandez was shot from a distance of two to six inches. The bullet traveled downward and to the right in Hernandez's chest.

Marengo was charged by information with one count of murder (Count 1; Pen. Code, § 187, subd. (a)) and one count of participation in a criminal street gang (Count 2; Pen. Code, § 186.22, subd. (a)). The information alleged as a special circumstance that Marengo intentionally killed the victim while Marengo was an active participant in a criminal street gang and that the murder was carried out to further the activities of the criminal street gang. (Pen. Code, § 190.2, subd. (a)(22).) With respect to Count 1, the information alleged as sentence enhancements that Marengo personally and intentionally discharged a firearm causing great bodily injury (Pen. Code, § 12022.53, subd. (d)), and that the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang (Pen. Code, § 186.22, subd. (b)(5)). As to both counts, the information alleged that Marengo had suffered a prior serious or violent felony conviction. (Pen. Code, § 1170.12, subd. (c)(1).)

After a trial at which Marengo did not testify, the jury found Marengo guilty of both counts and found true all special circumstance and enhancement allegations. The court sentenced Marengo to a prison term of life without possibility of parole plus 25 years on Count 1. The court stayed the gang enhancement on Count 1 pursuant to Penal Code section 654. Marengo received a consecutive term of 16 months on Count 2 (one-third the mid-term, doubled pursuant to the Three Strikes law).

DISCUSSION

Marenco asserts that the trial court abused its discretion by permitting the prosecutor to use Marenco's prior assault conviction (along with the street-gang enhancement found true in that previous proceeding) to prove various elements of the street-gang special circumstance and enhancements in the present proceeding. He asserts that the court erred in refusing to instruct the jury on self-defense and imperfect self-defense in relation to the murder count. Finally, he asserts that the punishment on Count 2 should be stayed pursuant to Penal Code section 654 because that punishment is duplicative of the punishment imposed for the street-gang special circumstance.

I. Prior crime evidence

At the beginning of the trial, the prosecutor stated that he intended to offer evidence of five criminal convictions by members of Dead End Loc. One of these was Marenco's own 2006 conviction for felony assault with a criminal street-gang enhancement. (Pen. Code, §§ 245, subd. (a)(1), 186.22, subd. (b)(1).) Marenco objected to the use of several of the crimes, contending for various reasons the evidence would be prejudicial under Evidence Code section 352.

The trial court overruled Marenco's objections and permitted the prosecutor to introduce the five previous crimes. One of the prosecution's gang experts testified concerning the prior crimes committed by four other gang members, and the court admitted certified copies of the records of conviction for those crimes and Marenco's 2006 assault conviction.

Marenco contends that the evidence concerning his prior assault conviction was cumulative and unnecessary to the prosecution's case; as a result, he says, the evidence was unduly prejudicial. (See Evid. Code, § 352.) We review the trial court's ruling for an abuse of discretion. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.)

In this case, admission of the evidence of Marenco's past conviction for assault with a street-gang enhancement was not an abuse of discretion. Among the five prior

crimes offered by the prosecutor, this assault conviction was uniquely probative of Marengo's active participation in the street gang, since it was the only one of the prior crimes attributed to him. In light of that uniqueness, the evidence was not merely cumulative of the other four crimes, which did not tie Marengo directly to gang participation. Nor was evidence of the prior assault cumulative of the other evidence showing that Marengo was a member of Dead End Loc in some generalized sense; the assault conviction (with the gang enhancement) established Marengo's personal participation in the criminal activities of the gang.

Even if the other evidence may have been sufficient to establish some version of the Penal Code section 186.22, subdivision (a), offense, the evidence of Marengo's 2006 conviction uniquely established one necessary component of the crime—that the defendant “actively participates” in a criminal street gang. Marengo contends the other evidence that he “was a member of the Dead End Locs and as such was aware of his gang's activities was not disputed and was overwhelming.” To the contrary, defense counsel sought and obtained concessions from the prosecution's gang expert that he had no knowledge that Marengo was involved in the four prior crimes of other Dead End Loc gang members or that he even knew the perpetrators of those crimes. We conclude the evidence was highly probative and was not merely cumulative.

As is often the case, this type of evidence undoubtedly was prejudicial to Marengo since it tied him to criminal activity of his gang.¹ For purposes of Evidence Code section 352, however, “‘prejudicial’ is not synonymous with ‘damaging,’ but refers instead to evidence that “‘uniquely tends to evoke an emotional bias against defendant’” without regard to its relevance on material issues.” (*People v. Kipp, supra*, 26 Cal.4th at p. 1121.)

¹*People v. Leon* (2008) 161 Cal.App.4th 149 is distinguishable. In *Leon*, the prosecution did not present evidence that the defendant's prior conviction was gang related, thus diminishing the probative value of the evidence. (See *id.* at p. 169, fn. 11.)

The 2006 conviction did not involve torture, murder, or other heinous facts. Marengo had been convicted of the crime, so there was no incentive for the jury to punish him “now” for what had occurred “then.” (See *People v. Williams* (2009) 170 Cal.App.4th 587, 610.) In short, the 2006 conviction involved no prejudicial elements unconnected to its probative force in establishing Marengo’s personal, criminal participation in Dead End Loc. The court did not abuse its discretion in admitting evidence of the 2006 conviction.

II. Self-defense

Marengo contends the trial court erred in denying Marengo’s request that the jury be instructed on self-defense. He notes that the court is required to instruct on self-defense when there is substantial evidence supporting that defense. (*People v. Sedeno* (1974) 10 Cal.3d 703, 716.)

In this case, the uncontested evidence is that Marengo pulled a gun on Hernandez and shouted at him (in the version most favorable to Marengo), “I’m gonna shoot your ass.” There is no evidence Marengo was in fear of Hernandez. (See *People v. Oropeza* (2007) 151 Cal.App.4th 73, 82.) The mere possibility of a jury’s “unexplainable rejection” of the uncontested evidence is not a substantial basis for instructing the jury on a theory of defense, any more than it justifies instruction on a lesser-included offense. (See *People v. Friend* (2009) 47 Cal.4th 1, 51-52 [discussing instruction on lesser-included offense].)

Here, the only evidence established that Marengo was a gun-wielding aggressor who threatened to shoot Hernandez. While it may not have been unreasonable for the jury to determine that Marengo did not mean to pull the trigger (although the jury impliedly rejected that theory), there was no factual basis upon which a rational jury could have concluded that Marengo acted in actual and reasonable fear of death or great bodily harm. (See, generally, 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000)

Defenses, § 64, p. 400.) We conclude that the trial court did not err in refusing to instruct on self-defense.

III. Imperfect self-defense

Even if a homicide defendant was unreasonable in fearing that the victim was going to inflict death or great bodily harm upon the defendant, the defendant is entitled to have the jury instructed on imperfect self-defense if there is substantial evidence the defendant acted in an honest but unreasonable fear that the victim was about to inflict death or great bodily injury on the defendant. (See 1 Witkin & Epstein, Cal. Criminal Law, *supra*, § 77, pp. 411-412.) Such a defense, if established, reduces murder to voluntary manslaughter by negating malice aforethought. (*People v. Flannel* (1979) 25 Cal.3d 668, 674.) Marengo contends that the court erred in refusing to instruct the jury concerning imperfect self-defense.

“The subjective elements of self-defense and imperfect self-defense are identical. Under each theory, the appellant must actually believe in the need to defend himself against imminent peril to life or great bodily injury. To require instruction on either theory, there must be evidence from which the jury could find that appellant actually had such a belief.” (*People v. Viramontes* (2001) 93 Cal.App.4th 1256, 1262.)

As discussed in section II, above, there was no evidence from which a rational jury could have inferred that Marengo acted out of fear of Hernandez. Accordingly, the trial court did not err in refusing to instruct the jury on imperfect self-defense.

IV. Penal Code section 654

Finally, Marengo contends that his 16-month sentence for participating in a criminal street gang must be stayed because that conviction “was based on the identical conduct underlying his conviction for murder in count 1.” We agree.

The jury found that Marengo committed the murder to further the activities of the criminal street gang and found true the special-circumstances allegation for Count 1, murder. The jury also found Marengo guilty of Count 2, which the verdict form stated

more generally as “[p]articipation in a criminal street gang.” The jury was instructed, however, that in order to find Marengo guilty on Count 2, it must find he “willfully assisted, furthered, or promoted felonious criminal conduct” by “directly and actively committing a felony offense” or by “aiding and abetting a felony offense.” The “felonious criminal conduct” was designated as “committing or attempting to commit the following crime: Murder.”

The jury necessarily found for both Count 1 and Count 2 that Marengo committed murder in order to further the activities of the criminal street gang. Marengo, relying on Penal Code section 654 and *People v. Sanchez* (2009) 179 Cal.App.4th 1297, 1315-1316, contends he should not be punished on Count 2.² Respondent, relying on *People v. Herrera* (1999) 70 Cal.App.4th 1456 and *In re Jose P.* (2003) 106 Cal.App.4th 458, contends that participating in a street gang has an objective separate and apart from a particular crime committed as a part of such participation. Accordingly, respondent says that punishment for the substantive crime of active participation in a street gang should not be stayed pursuant to Penal Code section 654.

We conclude that neither of these conflicting branches of case law controls Marengo’s case. The reason is that those cases all involve a *course of conduct* resulting in multiple charges. Those cases discuss the manner in which a court determines whether the course of conduct reflects sufficiently separable criminal objectives to permit separate punishment of various parts of the course of conduct. Such a determination is necessary in the case of a course of criminal conduct because *Neal v. State of California* (1960) 55 Cal.2d 11, 19, held that, where a course of conduct involves offenses that were “incident

²Penal Code section 654, subdivision (a), states: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.”

to one objective,” Penal Code section 654 prohibited punishment for more than one of the offenses.

But for purposes of Marengo’s case, that portion of *Neal* is not as important as the portion of the opinion that immediately precedes discussion of the “multiple objectives” test. Prior to its “multiple objectives” discussion, the *Neal* court restated the more straightforward application of Penal Code section 654: “‘If only a single act is charged as the basis of the multiple convictions, only one conviction can be affirmed, notwithstanding that the offenses are not necessarily included offenses. It is the singleness of the act and not of the offense that is determinative.’ Thus the act of placing a bomb into an automobile to kill the owner may form the basis for a conviction of attempted murder, or assault with intent to kill, or malicious use of explosives. Insofar as only a single act is charged as the basis for the conviction, however, the defendant can be punished only once.” (*Neal v. State of California, supra*, 55 Cal.2d at p. 19.)

Here, Marengo committed only one criminal act with only one relevant state of mind: He murdered Hernandez to further the purposes of the criminal street gang. The single murder was the only criminal act; while there were other statutory requirements in order for that act to constitute the particular crimes charged in Count 1 and Count 2, those additional requirements involve various mental states and states of knowledge, not additional acts. We conclude that the murder of Hernandez was a single act that can be punished only once. The sentence for Count 2, violation of Penal Code section 186.22, subdivision (a), must be stayed pursuant to Penal Code section 654.

DISPOSITION

The judgment of conviction is affirmed. The sentence is modified to stay the sentence imposed on Count 2, violation of Penal Code section 186.22, subdivision (a). As modified, the judgment is affirmed. The trial court shall prepare and distribute to the appropriate authorities an amended abstract of judgment showing that the determinate

sentence for violation of Penal Code section 186.22, subdivision (a), in case
No. MF46884 is stayed pursuant to Penal Code section 654.

Wiseman, Acting P.J.

WE CONCUR:

Gomes, J.

Kane, J.